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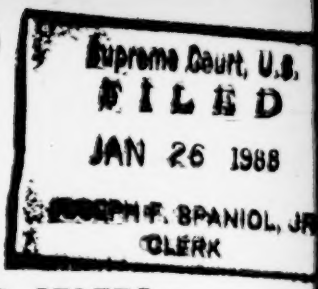

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN REGIS KING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

W. PENN HACKNEY, ESQUIRE
1516 Frick Building
Pittsburgh, PA 15219
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Counsel of Record for
Petitioner

QUESTION PRESENTED

I. MAY THE DISTRICT COURT, ON THE FACTS OF THIS CASE, IMPOSE CONSECUTIVE SENTENCES FOR CONSPIRACY TO COMMIT A PARTICULAR CRIME WITH PARTICULAR INDIVIDUALS AND FOR AIDING AND ABETTING AN ATTEMPT TO COMMIT THE SAME CRIME WITH THE SAME INDIVIDUALS?

TABLE OF CONTENTS

	Page
Question Presented.....	i
Parties.....	ii
Table of Authorities.....	1
Opinions Below.....	2
Statement of Jurisdiction.....	3
Statutes Involved.....	4
Statement of the Case.....	6
Reasons for Granting the Writ.....	13
Conclusion.....	24
Appendix:	
Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania dated April 22, 1987.....	1a
Judgment Order of the United States Court of Appeals for the Third Circuit dated October 28, 1987.....	6a
Indictment filed at Criminal No. 83-92 in the United States District Court for the Western District of Pennsylvania.....	8a
Certificate of Service.....	25

QUESTION PRESENTED

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PARTIES

John Regis King, your Petitioner herein, was jointly indicted in the District Court with Francis Ferri and Ivan Marra. Neither Francis Ferri nor Ivan Marra were parties to the proceeding in the Court of Appeals whose judgment is sought to be reviewed (Third Circuit No. 87-3302).

TABLE OF AUTHORITIES

Cases:

	Page
Blockburger v. United States, 284 U.S. 299 (1932).....	15, 16, 20
United States v. Bunney, 705 F.2d 378 (10th Cir. 1983).....	18
United States v. McQuisten, 795 F.2d 858 (9th Cir. 1986)....	14
United States v. Touw, 769 F.2d 571 (9th Cir. 1985).....	14, 21

Miscellaneous:

Comprehensive Crime Control Act of 1984.....	15, 22
Model Penal Code, Article V, Inchoate Crimes §5.05(3).....	21, 22
Title 18, Pa. Cons. Stat. §906 (Purdon).....	21
Title 18 U.S.C. §3584(a).....	23
Title 28 U.S.C. §994(1)(2).....	23
Wharton's Rule.....	19

OPINIONS BELOW

The Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania, denying Petitioner's Motion for Correction of Sentence was issued on April 22, 1987. It is unpublished and is set forth in the Appendix to this Petition at page 1a. The District Court's decision was affirmed by the United States Court of Appeals for the Third Circuit in a Judgment Order dated October 28, 1987. That Order is set forth in the Appendix at page 6a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered the judgment sought to be reviewed on October 28, 1987.

Section 1254(1) of Title 28, United States Code, confers jurisdiction upon this Court to review cases and judgments in the courts of appeals by writ of certiorari. Because Petitioner's appeal to the Third Circuit was from the denial of his Motion for Correction of Sentence under Rule 35 of the Federal Rules of Criminal Procedures, the appeal was treated as a civil case in the Third Circuit. Pursuant to 28 U.S.C. §2101(c) and Rule 20.4 of the Supreme Court Rules, the time for filing a Petition for Writ of Certiorari began to run on October 28, 1987 and expires on January 26, 1988.

STATUTES INVOLVED

Title 18, United States Code,

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18, United States Code,

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

***

Title 18, United States Code,

§844(i). Penalties

***

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both;

***

STATEMENT OF THE CASE

The issue presented by this Petition arises from the Third Circuit's affirmance of the District Court's denial of Petitioner's Motion to Correct an Illegal Sentence, filed under Rule 35(a) of the Federal Rules of Criminal Procedure.

A Federal Grand Jury sitting in the Western District of Pennsylvania indicted Petitioner, jointly with Francis Ferri and Ivan Marra, on June 28, 1983, at Criminal No. 83-92. (Appendix 8a). The indictment contained two counts: count one charged Ferri, Petitioner and Marra with conspiracy "to maliciously attempt to damage and destroy Buckaroo's, Inc., a building used in an activity affecting interstate commerce by means and use of an explosive in violation of

Title 18 United States Code §844(i)," in violation of 18 U.S. C. §371; count two charged that Ferri, Petitioner and Marra "did maliciously attempt to damage and destroy by means and use of an explosive, real property known as Buckaroos, Inc., located at 818 South Aiken Avenue, Pittsburgh, Pennsylvania, which was then being used in an activity affecting interstate commerce," in violation of 18 U.S.C. §§842(i) and 2.

After a jury trial, all three defendants were found guilty of both counts on June 18, 1984. On September 11, 1984, Petitioner was sentenced as follows: "The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years as to Count 1 of the Indictment. No fine. No costs.

As to Count 2 of the Indictment, defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years to run consecutively with the sentence imposed in Count 1 for a total term of ten (10) years imprisonment. No fine. No costs."

On January 21, 1987, Petitioner filed a Motion for Correction of Sentence, raising the issue presented herein. On April 22, 1987, the Motion was denied by the Honorable Barron P. McCune, Senior U.S. District Judge; Judge McCune also filed a Memorandum Opinion on the same date (Appendix 1a). Petitioner appealed Judge McCune's Order to the Third Circuit, which affirmed the Order on October 28, 1987.

This Petition seeks review of the Third Circuit's affirmance of the District Court's denial of Petitioner's Motion for Correction of Sentence. The underlying facts relevant to a consideration of the question presented herein are as follows:

At approximately midnight on June 10, 1982, a pedestrian stopped two Pittsburgh police officers and informed them that someone had broken a window in the door of the Buckaroo's Clothing Store ("Buckaroo's"). Upon their arrival at Buckaroo's, the officers noticed that the alarm system was turned off and that all of the broken glass was on the sidewalk outside the shop, indicating that it had been broken from within. The officers then entered the shop, but left immediately when they encountered a strong, sharp odor.

Further investigation by members of the Pittsburgh Fire Department uncovered an arson attempt gone awry. Investigators found fourteen five-gallon plastic containers throughout the store and its basement; all but one had been perforated and were leaking a liquid later identified as a highly flammable mixture of methanol and trichloroethane. They also found a hotplate wrapped in the sleeve of a shirt that had been soaked in the flammable liquid. This calculated effort to destroy Buckaroo's backfired, however, when the arsonists plugged the hotplate into a dead electrical socket.

Evidence tending to demonstrate a relationship between Petitioner and Francis Ferri included the following: a pen register showed that over a 20-day period, seven telephone calls occurred from the telephone at Petitioner's house

to a telephone registered to Luigi Ferri at an address where Francis Ferri lived; during the summer of 1982, Petitioner loaned Francis Ferri his car (i.e., the car registered to Petitioner's wife); within two weeks after the attempted arson, Francis Ferri was driving Petitioner's car (i.e., the car registered to Petitioner's wife); Petitioner, Ferri and the owners of Buckaroo's had been together socially, and Ferri was seen at a restaurant which Petitioner was said to frequent.

Evidence tending to demonstrate that both Petitioner and Ferri were the ones who attempted the arson at Buckaroo's included the following: clothing similar in size to that worn by Ferri and Petitioner was found at Buckaroo's after the arson attempt; foot impressions from the insides of shoes left at Buckaroo's matched inked footprints taken from Ferri and Petitioner;

subsequently, Ferri told two witnesses that he had set a "bomb," but that he had plugged it into a dead socket and it had not gone off.

REASONS FOR GRANTING THE WRIT

The District Court erred, on the facts of this case, by imposing consecutive sentences for conspiracy to commit a particular crime with particular individuals and for aiding and abetting an attempt to commit the same crime with the same individuals.

Count 1 of the indictment charged that Petitioner and his co-Defendants conspired together "to maliciously attempt to damage and destroy Buckaroo's, Inc.", and Count 2 charged that he and his co-Defendants did "maliciously attempt to damage and destroy. . . Buckaroo's, Inc." Petitioner submits that he cannot receive separate consecutive sentences for aiding and abetting an attempted crime and for conspiring to attempt the same crime.

Compare, United States v. Touw, 769 F.2d 571, 574 (9th Cir. 1985)(Defendants may not be convicted and sentenced for both attempt and conspiracy based on one course of criminal conduct under 21 U.S.C. §846) with United States v. McQuisten, 795 F.2d 858, 865-868 (9th Cir. 1986)(Defendant may be convicted and sentenced for both conspiracy and attempt under 21 U.S.C. §846 when the conspiracy is followed by a number of separate criminal transactions involving different people at different locations over a period of time).

Although United States v. Touw, supra, is technically distinguishable on the ground that there, two clauses of one statute were under consideration, while here, two separate statutes are at issue, Petitioner submits that whether one or two statutes are at issue is a distinction without a meaningful difference. The distinction's validity

rests on a mythical assumption that Congress does not intend separate punishments when it enacts a comprehensive crime bill including a single statute proscribing conspiracy and attempt, but because Title 18 is older and the history of its enactment is piecemeal, Congress does intend separate punishments of every possible violation and theory of prosecution found in it. Petitioner submits that this assumption is unwarranted, both philosophically and empirically, and is in fact countermanded by the Comprehensive Crime Control Act of 1984, as pointed out below.

In denying Petitioner's Motion for Correction of Sentence, the District Court held that Petitioner "has been convicted of two separate offenses because the elements of each are different." The District Court relied on the test enunciated in Blockburger v. United States, 284 U.S. 299 (1932).

The Court held that the offenses for which Petitioner was convicted are not "the same" because "an agreement is a necessary element of conspiracy, but not of an attempt". (2a)

The main thrust of the District Court's decision in light of Blockburger, supra, is an attempt may be punished in addition to the conspiracy to commit that attempt because an agreement is a necessary element of a conspiracy offense under §371, but not of an attempted arson under §844(i). Although this is a true statement of black letter law in the abstract, it is Appellant's contention that on the facts of his case and as alleged in the indictment brought by the Grand Jury, an agreement was also an essential element of Count 2 (aiding and abetting an attempt) as well as of Count 1 (conspiracy).

Although analytically distinguishable in theory, Petitioner submits that on the facts of this case, the two offenses are not meaningfully distinguishable at all. That is, the "agreement" required by the conspiracy charge is contemplated by and included as a necessary element in the charge described by Count 2: one cannot aid and abet an attempt without also "agreeing" with at least one other person to make that attempt. In this case, under Count 1, Marra agreed with Ferri and Petitioner to attempt to burn down Buckaroo's and to that end, Marra provided the explosive, while Ferri and Petitioner entered Buckaroo's, agreeing that they should attempt to start a fire. Under Count 2, Marra aided and abetted Ferri and Petitioner in an attempt to set fire to Buckaroo's by providing the explosive, while Ferri and Petitioner entered Buckaroo's, agreeing that they should attempt

to start a fire, each thus aiding and abetting the attempt.

The District Court also alluded to the principle that a conspiracy requires an overt act, implying that an attempt does not, which also distinguishes an attempt from a conspiracy for sentencing purposes. However, an attempt does require "a substantial step" toward commission of the offense, United States v. Bunney, 705 F.2d 378 (10th Cir. 1983), and in this case, the substantial steps undertaken by each participant in the course of the attempt were identical to the overt acts alleged and proved with respect to the conspiracy charge. Again, there is no meaningful distinction between "overt act" and "substantial step" on the facts of this case or in the indictment as drawn.

Furthermore, the substantive offense of Count 2, aiding and abetting an attempted arson, is an inchoate offense, requiring the participation and agreement of two or more persons; in this case the Grand Jury charged that three persons, Ferri, Petitioner and Marra, aided and abetted each other in the attempt. At the same time, the conspiracy offense, Count 1, is also an inchoate offense, requiring the participation and agreement of two or more persons; in this case, the Grand Jury charged the same three persons with conspiracy. By analogy to Wharton's Rule,[1/] Petitioner submits that

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1/ Wharton's Rule is a doctrine that, in certain circumstances, precludes punishing a person for both conspiracy and the completed substantive offense; it is an exception to the general principle that a conspiracy does not merge with the completed substantive offense and it applies when the substantive offense requires the participation of the same persons charged with the conspiracy. Since conspiracy of two persons to commit a crime that requires the participation of those same two persons is analogous to an individual attempt to commit an individual offense, it is presumed

(Continued on next page)

because the substantive offense described by the Grand Jury requires the participation of the same persons charged with the conspiracy, Petitioner cannot be separately punished for both the conspiracy and the inchoate substantive offense of attempting to commit the offense which is also the object of the conspiracy.

Petitioner submits that despite the apparently facile application of Blockburger, supra, to his case, federal law is not in fact clear on this issue. Rather, principles of logic, fairness and

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1/ Continued)
that the legislature does not intend separate punishment for both the conspiracy and the completed substantive crime. In this case, it should be remembered that the substantive offense was never completed; it remained inchoate like a conspiracy. The reasonsing behind this "rule" would seem to apply with even more force when both offenses are inchoate.

the rationale of United States v. Touw, supra, compel the conclusion that on the particular facts as alleged by the Grand Jury and as adduced at trial, these consecutive sentences are improper.

A look outside the realm of federal law compels this conclusion. For instance, Pennsylvania has long held by decision and statutes that a person may not be convicted of more than one inchoate crime (such as attempt and conspiracy) "for conduct designed to commit or to culminate in the commission of the same crime." Title 18, Pa. Cons. Stat. §906 (Purdon). This principle has also been adopted by the American Law Institute in its Model Penal Code, Article V, Inchoate Crimes, §5.05(3), which states "A person may not be convicted of more than one offense defined by this Article [attempt, solicitation and conspiracy] for conduct designed to commit

or culminate in the commission of the same crime." Approved Draft, 1962.[2/]

As there is no controlling authority directly on point given the admittedly unusual facts of this case, Petitioner submits that the American Law Institute's approach is more rational and fairer than that used by the District Court.

Petitioner also points out that relevant sections of the Comprehensive Crime Control Act of 1984 incorporate the American Law Institute's position on this issue. For instance, the U.S. Sentencing Commission is charged with the duty of insuring that the guidelines it

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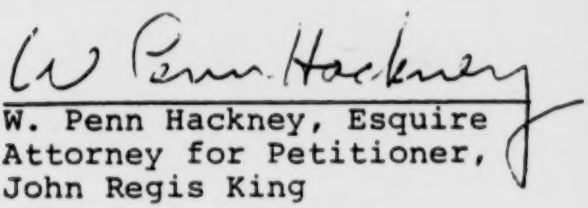
2/ The Model Penal Code goes even further than what is urged here, by precluding convictions for both an inchoate crime and the completed offense, Model Penal Code, Article I, §1.07(1)(b).

promulgates reflect "the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation." Pub. L. 98-473, Title II, §217(a), October 12, 1984, codified in 28 U.S.C. §994(l)(2). This policy direction to the Commission is also implemented by statute in 18 U.S.C. §3584(a)("The terms [of imprisonment] may not run consecutively for an attempt and for another offense that was the sole objective of the attempt")(Pub. L. 98-473, Title II, §212(a)(2), October 12, 1984, 98 Stat. 2000).

CONCLUSION

For the foregoing reasons, Petitioner, John Regis King, respectfully prays this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



W. Penn Hackney, Esquire
Attorney for Petitioner,
John Regis King

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal Action 83-92
JOHN REGIS KING	:	

M E M O R A N D U M

BARRON P. McCUNE, District Judge
April 22, 1987.

We consider the defendant's motion for correction of sentence filed pursuant to Rule 35.

The defendant was convicted of two Counts, the first conspiring to maliciously attempt to destroy Buckaroo's, Inc., a building used in an activity affecting interstate commerce by means of an explosive in violation of 18 U.S.C. §371, and Count 2, which charged that he did maliciously attempt to destroy by means of an explosive the same property in violation of 18 U.S.C. §884(i) and 2.

The defendant was sentenced to consecutive five year terms of imprisonment on Counts 1 and 2. He contends that

the conspiracy and the attempt are the same offense and consecutive sentences are in violation of the Double Jeopardy Clause of the Fifth Amendment.

Blockburger v. United States, 284 U.S. 299 (1932) holds that whether offenses are the same depends on whether each provision of the law requires proof of the same or different facts, or stated another way, does one law require proof of a fact that the other does not?

An agreement is a necessary element of conspiracy, but not of an attempt. Therefore one can distinguish the offenses because in addition to the elements of an attempt one cannot be convicted of a conspiracy unless he entered into an agreement with at least one other person to make the attempt. In addition one cannot be convicted of a conspiracy unless at least one overt act is committed by one of the charged conspirators.

In this indictment King was charged in Count 1, along with Francis Ferri and Ivan Marra, with the conspiracy. The overt acts charged were two, that Marra gave Ferri the explosive to be used and instructions for its use and secondly, King and Ferri entered the premises and made the attempt.

Count 2 charged King and Ferri with the substantive crime, the attempt. The purpose of charging a violation of 18 U.S.C. §2 was to connect Marra with the substantive crime as an aider and abettor. King was present in the premises. He and Ferri made the actual attempt by placing the explosive in the store. Marra was not present. The argument of King that he was convicted of Count 2 as an aider and abettor is simply wrong.

King therefore has been convicted of two separate offenses because the elements of each are different.

The motion will be denied.

An order follows.

/s/ Barron P. McCune
BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Criminal Action 83-92
	:	
JOHN REGIS KING	:	

O R D E R

AND NOW, April 22, 1987, the defendant's motion for correction of his sentence is denied.

/s/ Barron P. McCune
BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

cc: United States Attorney

W. Penn Hackney, Esq.
1516 Frick Building
Pittsburgh, Pa. 15219

U.S. Probation Office

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3302

THE UNITED STATES

v.

FRANCIS FERRI
JOHN REGIS KING
IVAN MARRI

JOHN REGIS KING,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania-Pittsburg
(D.C. Crim. No. 83-92 [Rule 35])
District Judge: Hon. Barron P. McCune

Submitted Under Third Circuit Rule 12(6)
October 23, 1987

Before: HIGGINBOTHAM, HUTCHINSON and SCIRICA,
Circuit Judges.

JUDGMENT ORDER

After considering the contention raised by appellant, to wit,

> that, on the facts of this case, the district court erred by imposing consecutive sentences for conspiracy to commit a particular crime with particular individuals and for aiding and abetting an attempt to commit the same crime with the same individuals,

it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

/s/ A. Leon Higginbotham, Jr.
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

October 28, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 83-92
	)	
FRANCIS FERRI	)	(18 U.S.C. §§371,
JOHN REGIS KING	)	844(i) and 2)
IVAN MARRA	)	

The grand jury charges that at all times pertinent hereto:

1. Buckaroo's, Inc. was a western apparel store located at 818 South Aiken Avenue, Pittsburgh, Pennsylvania and was engaged in an activity which affected interstate commerce.

COUNT ONE

From on or about June 1, 1982 until on or about June 15, 1982, in the Western District of Pennsylvania and elsewhere, the defendants, FRANCIS FERRI, JOHN REGIS KING and IVAN MARRA, willfully and knowingly did combine, conspire, confederate and agree together, with each other and with diverse

other persons unknown to the grand jury to commit the following offense against the United States: To maliciously attempt to damage and destroy Buckaroo's, Inc., a building used in an activity affecting interstate commerce by means and use of an explosive in violation of Title 18, United States Code, Section 844(i).

OVERT ACTS

In furtherance of the conspiracy and to effect the object thereof, the defendants performed the following overt acts:

1. On or about June 1, 1982, IVAN MARRA gave FRANCIS FERRI material to be used in the destruction of Buckaroo's, Inc. and provided instructions to FRANCIS FERRI as to how the explosive device should be set up.

2. On or about June 10, 1982, FRANCIS FERRI and JOHN REGIS KING entered Buckaroo's,

Inc. and attempted to damage and destroy the premises by placing volatile material in various parts of the store.

In violation of Title 18, United States Code, Section 371.

COUNT TWO

The grand jury further charges:

3. On or about June 10, 1982, in the Western District of Pennsylvania, the defendants, FRANCIS FERRI, JOHN REGIS KING and IVAN MARRA, did maliciously attempt to damage and destroy by means and use of an explosive, real property known as Buckaroo's, Inc. located at 818 South Aiken Avenue, Pittsburgh, Pennsylvania, which was then being used in an activity affecting interstate commerce.

In violation of Title 18, United States Code, Section 844(i) and 2.

A true bill,

/s/ Blair Hanson
Foreman

/s/ J. Alan Johnson
J. ALAN JOHNSON
United States Attorney

CERTIFICATE OF SERVICE

I, W. Penn Hackney, Esquire, Attorney for Petitioner, John Regis King, hereby certify that I have served a true and correct copy of the within Petition for Writ of Certiorari upon the following by first-class mail, postage prepaid, this 26th day of January, 1988:

Hon. Charles Fried
Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

Sally Mrvos
Clerk of the U.S. Court of
Appeals for the Third Circuit
Philadelphia, PA 19106-1790

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W. Penn Hackney

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Attorney for Petitioner